

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original & Affidavit of Mailing

77-1232

To be argued by
DAVID S. GOULD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1232

B p/s

UNITED STATES OF AMERICA,

—against—

Appellee,

CARMINE ROTOLO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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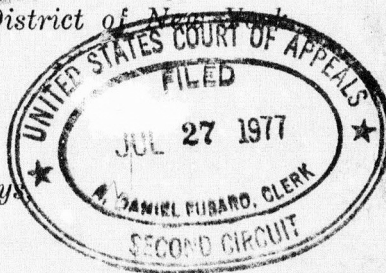


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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1232

UNITED STATES OF AMERICA,

Appellee,

—against—

CARMINE ROTOLO,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Carmine Rotolo appeals from a judgment of the United States District Court for the Eastern District of New York, (Pratt, J.) entered on January 6, 1977, convicting him, after a jury trial, of all counts of a seven count indictment. Count I charged that appellant knowingly and unlawfully conspired with Leonard DeMetro and Frank Irace, named as co-conspirators but not as defendants, and others, to possess with intent to distribute and to distribute quantities of heroin in violation of Title 21, United States Code, Section 846. The remaining counts charged that on August 5 and September 9, 1974 and on March 10, 1975, appellant aided and abetted the possession of quantities of heroin with the intent to distribute (Counts II, IV and VI, respectively), and on the same dates, aided and abetted the distribution of quantities of heroin (Counts III, V, and VII, respectively), all in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

The appellant was sentenced to concurrent terms of four years imprisonment on Count I, Counts II and III combined, Counts IV and V combined and Counts VI and VII combined, with a five year term of special parole to follow completion of the prison sentence. He was also fined the sum of \$10,000. Appellant is presently free on bail pending this appeal.

Statement of Facts

Appellant and Leonard DeMetrio, the Government's main witness at trial, first met in 1971 while both were working for Western Union International at 26 Broadway, in New York City. Initially, their relationship was a social one. Then, during 1972, after he had ceased working at Western Union International, DeMetrio was told that there was money to be made in selling heroin. Knowing that appellant supplied heroin, he met with appellant at 26 Broadway and arranged to purchase his first quarter ounce (101-03).¹ Following this transaction, DeMetrio continued purchasing quarter ounces of heroin from appellant. With his friend, Frank Irace, DeMetrio cut the heroin obtained from appellant and sold it in twenty-five dollar pieces (109-10). Eventually, DeMetrio informed appellant that Irace was selling the heroin with him (110).

In April of 1974, DeMetrio again met appellant at 26 Broadway to purchase another quarter ounce. On this occasion, appellant complained to DeMetrio that he was buying and selling quarter ounces with too great a frequency, and urged him, instead, to make a four ounce purchase. When DeMetrio explained that he did not have the \$5,900 purchase price, appellant offered him the

¹ Record references preceded by dates are to the respective transcripts of pre-trial proceedings. Unless otherwise indicated, all other references are to the transcript of the trial.

heroin on consignment. The offer was accepted, and DeMetrio brought the four ounces home (111-12, 223).

That night, DeMetrio took the four ounces of heroin to Irace's house, and there, Irace and DeMetrio, along with a friend of Irace's referred to during the trial as Frankie Mambo, cut, or diluted, the first ounce (113, 220-21, 223-24, 228). Previously, appellant had instructed DeMetrio on cutting the heroin, and Frankie Mambo had demonstrated how to do it (224).

Several months later, Frankie Mambo, who had since become a government informant, arranged for Special Agent Emilio Garcia of the Drug Enforcement Administration to purchase quantities of heroin from DeMetrio and Irace (113-14, 221, 437-38). The first purchase, of one ounce, occurred on August 5, 1974 (96-98, 230-33, 329-30). A month later, on September 9, 1974, Garcia purchased a second ounce of heroin from DeMetrio and Irace (98-99, 237, 330).

Both ounces of heroin Agent Garcia purchased from DeMetrio and Irace in August and September of 1974 came from the four ounces of heroin DeMetrio had obtained from appellant on consignment in April of 1974 (113-14, 230). Soon after the second sale, DeMetrio repaid appellant \$5,900 using, in part, the proceeds of those two sales to Agent Garcia (115-16, 223, 236). At that time, he informed appellant that "someone was dealing steadily and was buying weight" (115-16).

From approximately October of 1974 to early March of 1975, appellant had no heroin available (116). During this period, DeMetrio telephoned appellant a number of times from Irace's house, and Irace and appellant had conversations over the phone (116, 302). In October of 1974, DeMetrio introduced Irace and appellant at a football game played in Redhook Stadium in Brooklyn. At that time, Irace asked appellant about obtaining more

drugs. Appellant replied that he needed time, and that patience was required (117-18).

In early March of 1975, appellant telephoned DeMetrio and advised him that more heroin was available. DeMetrio and appellant again met at 26 Broadway, and DeMetrio obtained an additional four ounces of heroin from appellant, again on consignment (118-19, 238-39). Unlike the first four ounces he received from appellant in April 1974, this heroin contained brown particles (119) and was difficult to cut (241-42). When DeMetrio and Irace had samples of this heroin tested by others, they were informed that it was of extremely poor quality (119, 239, 242-48).

At about this time, DeMetrio was informed by Frankie Mambo that Agent Garcia wanted to purchase an additional two ounces of heroin. DeMetrio and Irace diluted the four ounces obtained from appellant to make six ounces and, on March 10, 1975, sold two of the six ounces to Agent Garcia. Soon thereafter, in mid-March of 1975, DeMetrio returned the remaining four ounces to appellant, complaining of the poor quality (119-20, 248-49, 333-34). He made no payment to appellant for the two ounces distributed to Agent Garcia (250).

At the time of the March 10, 1975 sale, Agent Garcia expressed an interest in purchasing a kilogram of heroin. DeMetrio replied that he would speak with his source, who would have to be present at such a transaction (123, 333-34). When DeMetrio told appellant that the person who had bought the last few ounces wanted to purchase a kilo, appellant commented that this individual was buying "too much too fast" and cautioned DeMetrio to "watch it" because he "might be a cop" (123-24).

On April 11, 1975, DeMetrio and Irace were arrested by agents of the Drug Enforcement Administration (124, 343). Both agreed to cooperate. As part of his coopera-

tion, DeMetrio agreed to wear a recording device during a luncheon meeting with appellant on April 25, 1975 (125-28, 254-58, 351-54). He also accepted from Agent Garcia a small recording device to be placed on his telephone, and, on instructions from Agent Garcia, he recorded each of his telephone conversations with appellant until the time of appellant's arrest (152-54, 347).

The tape recording of the April 25, 1975 meeting between appellant and DeMetrio and the tapes of DeMetrio's various telephone conversations with appellant were admitted into evidence at trial. The jury was also provided with a transcript of each tape, which they were permitted to read while the tape was being played (128-29, 153-54, 187-88). Additionally, Leonard DeMetrio testified to the meaning of certain ambiguous words and statements on the tapes, and explained the context of a number of the references (146-52, 182-87, 199-202).

The conversations recorded on the tapes included extensive discussions of drugs and drug dealings, in both heroin and cocaine. While no transaction was consummated during this period, from approximately April to December of 1975, because, as the tapes make clear, appellant's narcotics source had been arrested, the recorded conversations clearly established a long-term drug-dealing association between appellant and DeMetrio and showed that appellant always anticipated making future sales to DeMetrio, as soon as drugs became available (134-37, 140, 145, 148-52, 157-59, 168-70, 172, 175, 178-80, 183-87, 190-97, 199-202). Additionally, the tapes contained express references to the poor quality heroin DeMetrio had obtained from appellant in March of 1975, which formed the basis of two of the substantive counts in the indictment (135, 138, 149-51). Further, contrary to appellant's denials at the time of his arrest, the tapes made it clear that appellant knew Frank Irace and socialized often with Leonard DeMetrio (143-44, 151-52, 159, 181, 187).

Subsequent to his arrest on January 26, 1976, appellant made a number of incriminating statements. As noted, he flatly denied knowing Frank Irace—either the name or the individual in a picture (of Irace) which was shown to him. When given a picture of Leonard DeMetrio, appellant stated that he knew him as a fellow employee at 26 Broadway. Upon further inquiry as to whether they socialized, appellant said only that "I used to go out with him for lunch." Finally, appellant was shown a picture of Alphonse Sisca, his suspected source. Initially, he stated that he knew Sisca through his wife, but denied ever socializing with him. Subsequently, in response to a statement by the agents that "we know you are buying drugs from Alphonse Sisca," appellant replied, "I know you guys know but you can't prove it." (365-67).²

ARGUMENT

POINT I

There Was Sufficient Evidence To Sustain Appellant's Conviction On All Counts.

It would appear that appellant, in two points of his brief, contests the sufficiency of the Government's proof. In Point II, appellant seems to contend that the evidence was inadequate to sustain his conviction on the substantive counts—charging him with aiding and abetting DeMetrio and Irace in their possession and sale of heroin. In Point IV, although never expressly stated, he appears

² Both DeMetrio and Irace entered pleas of guilty to single count informations charging possession of heroin in violation of Title 21, United States Code, § 844. Irace received a suspended sentence and was placed on probation for a period of 5 years. DeMetrio received a one year sentence, eight months of which was suspended and he was placed on probation for a period of three years.

to argue a failure of proof on the conspiracy count.³ Contrary to appellant's claims the evidence adduced below was more than sufficient to sustain the jury's verdict on all counts.

A. The Substantive Counts

Section 2 of Title 18, United States Code, provides that one who "aids, abets, counsels, commands, induces or procures" the commission of a crime is punishable as a principal. The classic formulation of this concept, as set forth by the Supreme Court in *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949), quoting Judge Learned Hand in *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938), is as follows:

"In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'"

It is settled that an aider and abettor need not be physically present during the commission of the crime. Nor need he have a direct financial interest in the venture. *United States v. Manna*, 353 F.2d 191 (2d Cir. 1965), *cert. denied*, 384 U.S. 975, *reh. denied*, 385 U.S. 893 (1966). Further, it is not necessary that he know each detail of the crime or all of the persons who are committing it. *United States v. Lane*, 514 F.2d 22, 27 (9th Cir. 1975). Rather, he must simply be shown to have knowingly and intentionally participated in the venture,

³ Since, as will be shown, the Government offered abundant evidence of appellant's guilt on all counts of the indictment, we consider unnecessary any response to appellant's further claim that "... the Government charged conspiracy because it knew it could not prove a substantive crime. . ." (App. Br., pp. 19-20).

and to have done so in some active way. *United States v. Mariani*, 539 F.2d 915, 919 (2d Cir. 1976); *United States v. Johnson*, 513 F.2d 819, 823 (2d Cir. 1975); *United States v. Dickerson*, 508 F.2d 1216, 1218 (2d Cir. 1975). And "evidence of an act of relatively slight moment may warrant a . . . finding [of] participation." *United States v. Gargulio*, 310 F.2d 249, 253 (2d Cir. 1962).

Applying these principles to the case at bar, the proof adduced at trial amply warranted the conclusion that appellant was an aider and abettor of the substantive crimes committed by DeMetrio and Irace—the possession and sale of heroin on three occasions to Agent Garcia.

Initially, the very subject of each of the substantive counts in the indictment—the heroin—was furnished by the appellant. Further, appellant was not simply a remote supplier of the drugs; he was the immediate source of a principal of the sales, Leonard DeMetrio.

Moreover, because he supplied the heroin to DeMetrio on consignment, appellant had a direct financial interest in each of the sales charged. The four ounce package of heroin from which the first two sales were made was given by appellant to DeMetrio in April of 1974, on the understanding that the purchase price was due after the heroin was resold. Soon after the second sale to Agent Garcia, in approximately October of 1974, DeMetrio remitted to appellant, as part of the purchase price, almost all of the proceeds of both of these two sales.

The third sale to Agent Garcia, in March of 1975, was also from a four ounce package of heroin on consignment. Since DeMetrio had diluted that package and returned four ounces as unsaleable, appellant received no proceeds from this third transaction. However, this very willingness to take the four ounces back itself demon-

strated appellant's keen financial interest in DeMetrio's sales. In short, when it appeared the merchandise could not be resold, appellant assumed the entire financial risk.⁴

The evidence also showed that, apart from the credit aspects of the transactions, appellant actively assisted and encouraged DeMetrio's drug dealings in other ways. First, it will be recalled, appellant was the one who initially instructed DeMetrio as to how to cut the heroin for resale. Further, it was appellant who urged DeMetrio to make his first substantial drug purchase. When DeMetrio met appellant at 26 Broadway, in April of 1974, he had gone with the intention of buying only a quarter ounce of heroin, the same quantity he had always purchased. But appellant prompted him to take four ounces, advising that he had been buying and selling the quarter ounces with too great a frequency. Significantly, too, DeMetrio did not have the \$5,900 purchase price for the heroin. Thus, had appellant not offered it on consignment, DeMetrio could not have acquired the heroin at all.

The evidence established, further, that appellant was kept informed of the resales, that he was consulted with regard to them, and that he offered advice. After the second sale charged in the indictment, DeMetrio informed appellant of his progress. In fact, he specifically advised appellant about Agent Garcia, stating that a customer was "buying steadily" and "buying weight." Subsequently, during the third sale, when Agent Garcia expressed an interest in an additional, larger purchase, DeMetrio responded that such a transaction would require appel-

⁴ During their luncheon meeting in April of 1975, appellant told DeMetrio that this particular quantity of heroin had still not been completely disposed of, and that another dealer, referred to as "Superfly", was selling it for him (138, 150-151).

lant's presence and approval. Soon then^{er}after, DeMetrio reported to appellant on Garcia's proposal. At that time, appellant cautioned DeMetrio that this customer was "buying too much too fast" and "might be a cop," and advised him to "watch it."

The proof showed, too, that the sales by which appellant supplied the heroin at issue in this case were not isolated transactions. On the contrary, over a period of approximately two years prior to April of 1974, appellant and DeMetrio had, in addition to their social relationship, established an ongoing business association—that of heroin supplier and dealer. Furthermore, the tapes introduced at trial made clear that appellant had always planned to continue that relationship. He anticipated distributing further drugs through DeMetrio and Irace as soon as he was able to obtain them from his own source.

In sum, appellant's connection to the crimes charged in the indictment was neither peripheral nor attenuated. He supplied the heroin, maintained a direct financial interest in the transactions, kept himself informed of their progress and actively encouraged and counseled the principals.

A similar fact pattern was before this Court in the case of *United States v. Bommarito*, 524 F.2d 140 (2d Cir. 1975). There, appellant, a supplier of methaphetamines, challenged *inter alia*, the sufficiency of the evidence to support his conviction as an aider and abettor of his buyer, one Ciraco. Like appellant here, Bommarito had supplied his buyer with the drugs on credit, and received some of the proceeds of his buyer's sale to an undercover agent. Similarly, too, the buyer kept Bommarito informed of his sales efforts, and the two anticipated future transactions. Based on this evidence, the court easily distinguished the case of *United States v.*

Peoni, 100 F.2d 401 (2d Cir. 1938), upon which appellant, here, relies. Specifically, the court observed:

"[U]nlike the seller of counterfeit bonds in *United States v. Peoni*, *supra*, who merely knew in a general way that the bonds might pass from his buyer into a third party's hands, appellant [Bommarito] remained actively interested in Ciraco's resales of the drugs, received money from those resales, and obviously planned to provide Ciraco with more merchandise for sale in the future." *United States v. Bommarito*, *supra*, at 145.

Further, the Court stated:

"This . . . evidence of appellant's continuing active stake in the outcome of Ciraco's sales . . . adequately supports his conviction as an aider and abettor of Ciraco's possession and distribution, pursuant to 18, U.S.C. § 2. From the evidence, it seems clear that appellant fits within the requirements this court has laid down for conviction for aiding and abetting. . . ." *United States v. Bommarito*, *supra*, at 145.

In *United States v. Wiebold*, 507 F.2d 932 (1974), the Eighth Circuit, too, considered the question of whether a drug supplier was chargeable as aider and abettor of his buyer's resales. There, that court had no difficulty concluding that where, as here, there was proof that the drugs were delivered on consignment, the evidence was sufficient to establish the supplier's knowing association and participation in the buyer's criminal acts.

Pertinent, too, is *United States v. Campisi*, 306 F.2d 308 (2d Cir. 1962). There, two of the appellants, San-antonio and Coppola, had sold stolen bonds to a number of middlemen who, in turn, recruited passers who forged

and uttered the bonds. On appeal, Sanantonio and Coppola claimed that the evidence did not sufficiently connect them with the forging and uttering of the bonds to warrant their conviction for aiding and abetting those crimes. In substance, their argument was analogous to that of appellant here—that they had merely sold the bonds to the middlemen and were not concerned with the subsequent attempts to pass them. Also, like appellant in *Bommarito* and appellant here, they relied, in their argument, upon *United States v. Peoni, supra*.

Initially, the court made clear that the *Peoni* holding did not control the case before it, since the defendant in *Peoni* had been charged with aiding and abetting a remote, not an immediate, vendee. In this regard, the court wrote:

“In *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938), the defendant was charged with aiding and abetting the possession of a remote vendee of counterfeit money. In reversing the conviction the court relied on the fact that the principal, i.e. the individual whose possession defendant was charged with abetting, was not a vendee of the defendant. The court expressly left open the question whether the same result would obtain if the immediate vendee was charged with possession, a question closely analogous to that presented in this appeal.” *United States v. Campisi, supra*, at 311.

Further, the court found that the evidence amply supported the aiding and abetting charges against appellants, since, similarly to appellant here, their initial sale of the bonds was illegal, some portion of their payment was conditioned on successful passing, and their future sales were at least implicitly conditioned on successful passing. *United States v. Campisi, supra*, at 311.

In view of these authorities, appellant's attack upon the sufficiency of the evidence in this case must fail. The proof of his active interest and participation in the substantive crimes committed by DeMetrio and Irace is, as detailed earlier, far stronger than that found more than sufficient to establish aiding and abetting in the above cases. Further, the holdings of this Court in both *Campisi* and *Bommarito* make it clear that his reliance upon *United States v. Peoni*, *supra*, is entirely misplaced.

B. The Conspiracy Count

Appellant's claim that the evidence adduced at trial was insufficient to sustain his conviction on the conspiracy count is equally without merit. While his argument in this regard is never made entirely clear, it would appear that he relies primarily on the settled principle that a "conspiracy is not proved by proof of an agreement to act *generally* contrary to law." (App. Br., p. 20). We do not, of course, take issue with the continued vitality of that established doctrine. See, e.g., *United States v. Rosenblatt*, — F.2d —, Slip Op. 3031 (2d Cir., decided April 19, 1977). But we do dispute any suggestion that it is relevant to the instant case.⁵

The conspiracy charged here was, in the words of the indictment, an agreement among appellant, Leonard DeMetrio, Frank Irace and "others unknown . . . to possess with intent to distribute and to distribute quantities of heroin hydrochloride . . . in violation of Title 21, United States Code, Section 841(a)(1)." The objective of the scheme charged—the distribution of narcotics to the consuming public—was a specific one. Further, both the illegal agreement and appellant's active and knowing

⁵ Nor do we perceive the relevance of *United States v. Freeman*, 498 F.2d 569 (2d Cir. 1974), a case holding that an accessory after the fact, who made efforts to conceal members of an already aborted drug conspiracy but in no way participated in that venture, could not be held guilty of the narcotics conspiracy.

participation in the scheme were amply established by the evidence earlier reviewed. See, e.g., *United States v. Bommarito*, *supra*; *United States v. Calabro*, 467 F.2d 973, 981 (2d Cir. 1972), *cert. denied*, 410 U.S. 926, *rehearing denied*, 411 U.S. 941 (1973); *United States v. Bynum*, 485 F.2d 490 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903-904 (1974), *aff'd on remand* 386 F. Supp. 449 (S.D.N.Y. 1974), *aff'd*, 513 F.2d 533 (2d Cir.), *cert. denied*, 423 U.S. 952 (1975); *United States v. Tramaglino*, 197 F.2d 928 (2d Cir.), *cert. denied*, 344 U.S. 864 (1952); and *United States v. Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).⁶

POINT II

The Trial Court Properly Charged Aiding And Abetting In Connection With All Of The Substantive Counts Of The Indictment.

Appellant attacks his convictions under Counts II, IV and VI of the indictment, those charging aiding and abetting the possession of heroin with the intent to distribute, because, according to appellant, the trial court neglected to charge aiding and abetting in connection with those counts. This omission, appellant contends, requires the reversal of his convictions under those counts since the Government's proof did not establish his actual possession of the heroin on the dates charged in the indictment.

⁶ In *Agueci* this court again limited *United States v. Peoni*, *supra*, writing, with respect to the holding in that case on the sufficiency of the evidence to sustain the conspiracy count:

"Had the prosecution in *Peoni* been able to establish more than one sale from Peoni to Regno, the inference that Peoni knew that sales beyond his own would be made, and that he thus shared a common purpose with Dorsey as Regno's vendee, might well have been strong enough to warrant submission to the jury." *United States v. Agueci*, *supra*, at 827.

Appellant's entire argument on this point is based on an obvious error in transcription—an error which has since been corrected pursuant to Rule 36, Federal Rules of Criminal Procedure.

After setting forth the elements of the crimes of possession and distribution of heroin (639-40), Judge Pratt, in his charge to the jury, turned to aiding and abetting. He explained that, under the Government's theory in this case, the defendant was charged with aiding and abetting these narcotics offenses (641), and he then proceeded to review the elements of aiding and abetting (641-42). At page 641 of the trial transcript, where Judge Pratt first made reference to aiding and abetting in his charge, the transcript erroneously refers in two places to "counts 2, 3 and 7". In fact, as the corrected page of the transcript indicates, Judge Pratt stated, in both instances, "counts 2 through 7".⁷

While even appellant recognized the phrase "counts 2, 3 and 7" to be a "transcriptional error", he chose, based on a somewhat tortured process of reasoning, to assume that the court in fact said "counts 3, 5 and 7" (App. Br., p. 7). It is this assumption that forms the basis of his argument that the court failed to charge aiding and abetting on counts 2, 4 and 6. However, that the court in fact said "counts 2 through 7", and properly charged aiding and abetting in connection with all of the substantive counts, is obvious from the following statement, made by Judge Pratt just two sentences later:

"Thus, if you find beyond a reasonable doubt that someone other than the defendant committed an offense charged in *count 2, 3, 4, 5, 6 or 7*, and

⁷ The correct and certified page 641 of the trial transcript is reproduced at page A2 in the appendix to this brief. The Memorandum and Order of Judge Pratt granting the Government's motion to correct the transcript is reproduced at page A3 in the Government's appendix.

that the defendant aided or abetted the commission of the offense, you may find the defendant guilty of the count charging that offense..." (641-42, emphasis supplied).

In any event, in view of the correction of the record, there is no basis whatsoever for appellant's contention.

POINT III

The Narcotics Exhibits And The Testimony Of The Chemist Regarding Their Contents Were Properly Admitted Into Evidence.

Appellant argues that the trial court erred in admitting into evidence the narcotics exhibits (Govt. Exs. 1, 2 and 3) and the chemist's testimony with regard to them, on the ground that the Government failed to establish a sufficient chain of custody. The claim is entirely without merit.

Rule 901(a) of the Federal Rules of Evidence, which governs questions of authentication and identification, provides as follows:

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

As one commentator has explained, the central point of the Rule is that:

"whenever proffered evidence is challenged on grounds of authenticity or identity, it should be admitted once a *prima facie* case has been made on the issue..."

The opposing party may introduce evidence disputing genuineness and argue the point to the jury...

The rule requires only that the court admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification. The rest is up to the jury." 5 *Weinstein's Evidence*, p. 901-16.

Here, the evidence offered by the Government clearly afforded a rational basis from which the jury could infer that each of the heroin exhibits came from appellant.

With respect to Government Exhibits 1 and 2, Leonard DeMetro testified that in April of 1974, he purchased his first four ounce package of heroin from appellant. That evening he brought it to Frank Irace's house, where the heroin was kept (111-13, 214-20, 228-29). From this package, in August and September of 1974, he and Irace made the first two sales of heroin to Agent Garcia. (113-14, 230). With respect to Government Exhibit 3, DeMetro testified that this heroin came from the four ounce package he had obtained from appellant in March of 1975, within weeks of the third sale to Agent Garcia. (118-20, 248-49). As in the case of the earlier Exhibits, this heroin was cut at Frank Irace's house, and remained there until the sale to Agent Garcia was made (239-49). Further, DeMetro made clear in his testimony that appellant was his and Irace's only source of heroin. (205, 304).⁸

The subsequent links in the chain of custody were established by Agent Garcia and Anthony Fonsica, the Drug Enforcement Administration chemist. Agent

⁸ DeMetro also identified each of the exhibits—the first two by the handkerchiefs in which they were wrapped when they were sold to Agent Garcia, and the third by the unusual brownish particles which had made the heroin difficult to cut.

Garcia testified that after purchasing each of the Exhibits from DeMetrio and Irace (329-34), he placed them in lock-sealed envelopes, properly initialed them and turned them over to the evidence custodian at the Drug Enforcement Administration laboratory. (334-40). Mr. Fonsica testified to his receipt of each exhibit from the evidence custodian, and the procedures and results of his analysis. (27-32, 34-43).

While the government's proof did not directly account for the custody of the narcotics exhibits during each moment that elapsed from the time they left appellant's hands, that is not required. As this Court stated in *United States v. Montalvo*, 271 F.2d 922, 925 (2d Cir. 1959), *cert. denied*, 361 U.S. 961 (1960), such matters go "to the weight of the evidence and not to its admissibility; it is not necessary to exclude all other possibilities in order to establish sufficient authentication . . ." See, also, *United States v. Natale*, 526 F.2d 1160 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976). Here, however, as Judge Pratt ruled (533), the government's proof did show a sufficient rational basis from which the jury could properly conclude that the exhibits came from appellant. Appellant's only arguments to the contrary on this appeal are based on serious distortions of the record.

First, contrary to appellant's claim, at no point did DeMetrio "admit changing the contents" of the exhibits (App. Br. p. 17)—except to the extent that the heroin obtained from appellant was cut and repackaged before it was sold to Agent Garcia. Nor does the record fairly support the bald assertion that "DeMetrio was in and out of possession of the material for months" (App. Br. p. 17). At best, this claim is a misleading reference to DeMetrio's testimony that, prior to the re-sales, he and Irace kept the heroin in a small basement room at Irace's house. (228-29, 244, 248-49). Appellant's further claim, "that a government informant could have testified to

the exact material in issue" (App. Br. p. 17), is completely contrary to the evidence. The testimony was that Frankie Mambo, to whom appellant apparently refers, was present at Frank Irace's house in April of 1974 when the first of the four ounces of heroin was cut. (227). There was not a shred of evidence to suggest that he took possession of any of the heroin at any time, no less that he analyzed or altered its contents.

In sum, based on the actual record, as distinguished from appellant's characterizations of it, the narcotics exhibits were more than sufficiently authenticated. Accordingly, both the exhibits and the chemist's testimony concerning their contents were properly admitted into evidence. Further, since the highly probative value of the heroin—the very subject of the crimes charged—is indisputable, Rule 403 of the Federal Rules of Evidence, permitting the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice" (App. Br., p. 18), can have no possible application to this case.

POINT IV

The Tape Recordings Of Appellant's Conversations With DeMetrio And Transcripts Of Those Recordings Were Properly Admitted Into Evidence.

Appellant's multiple and varied challenges to the admissibility of the tapes and transcripts at trial bear a striking common feature: None of them find any support whatsoever in the record below.

As noted earlier, the tapes here challenged consisted of one tape of conversations between appellant and Leonard DeMetrio during a luncheon meeting on April 25, 1975 (Gov't. Ex. 4), and two tapes which recorded a

series of telephone conversations between them occurring from June to December of 1975 (Govt. Exs. 5 and 6).⁹ As also noted, the tapes contained, among other things, extensive discussions of drugs and drug dealings as well as several direct references to the heroin which was the subject of the third sale to Agent Garcia on March 10, 1975. At trial, the tapes and transcripts were authenticated by Leonard DeMetrio, who testified that he had listened to the tapes and read the transcripts, that the tapes accurately recorded his conversations with appellant, and that the transcripts accurately reflected the contents of the tapes (128-29, 153-54, 187-88). After each tape was played, DeMetrio testified to the context of the conversations and the meaning of certain of the words and phrases used by himself and appellant (146-52, 182-87, 199-202).

Among appellant's blatantly misleading assertions on this appeal with respect to the tapes are his repeated references to the "concededly" or "admittedly inaudible" tapes (App. Br., pp. 21, 22). At no time did the Government "concede" the inaudibility of the tapes. In fact, the prosecutor stated that "They are clear tapes." (11/8/76, at 7). As is reflected in the transcripts of the recordings, there were occasional moments when words or phrases were difficult to decipher. However, these portions were so insubstantial as to leave unaffected the uniformly high quality of the recordings.

Precisely because of the overall clarity of the tapes, it is not surprising that appellant—contrary to his claim on this appeal—raised no objection to their audibility either before or during the trial.

The record establishes that over a month prior to the commencement of trial, defense counsel was supplied with

⁹ Transcripts of the tapes (Govt. Exs. 4A, 5A and 6A) are reproduced in the appendix to this brief at pages through A6-A41.

copies of all tapes pertaining in any way to the proceeding, and transcripts of those tapes which the Government anticipated introducing at trial (11/8/76, at 4-5). Counsel was requested to review the tapes and transcripts, and to advise the Assistant United States Attorney of any disputed portions.¹⁰ While appellant now refers to "disputed portions . . . so substantial as to prejudice the entire trial" (App. Br., p. 23), at no time did defense counsel complain that the tapes were inaudible or the transcripts in any way inaccurate.

At trial, defense counsel vehemently objected to admission of the tapes into evidence—but only on the grounds of relevancy, a claim now abandoned on appeal. After hearing extensive argument on this issue and reviewing each of the transcripts in chambers, Judge Pratt properly found that the conversation on the tapes contained probative admissions on facts at issue in the proceeding, and thus ruled that they would be admitted into evidence (5-7). He did not listen to the tapes or compare them to the transcripts because no question of audibility or accuracy was ever raised. Indeed, defense counsel affirmatively disclaimed any contention that the tapes had been altered (11/8/76, at 20). Further, in response to a direct question posed by the court as to whether there were any objections to the tapes aside from relevancy, defense counsel stated that there were not (48).

¹⁰ In this connection, the prosecutor pointed out:

"Your Honor, the tapes have been in [the] defense's possession for literally five or six months although . . . [in] Mr. Cerny's possession—probably for a month or two. . . . I made a request many times to Mr. Cerny if his view of the transcript was any different from ours. . . . I would like to make it clear we received no notification. I assume the transcripts are acceptable insofar as they accurately reflect what's on the tapes. . . ." (11/8/76, at 4-5).

Subsequently, defense counsel did make a general objection to the giving of the transcripts to the jury, but he explained that this objection was simply to avoid any inconsistency with the position he had taken with regard to the relevancy of the tapes (58-59). Finally, after further inquiry by the court, counsel stated simply that he was "not ready to stipulate" to the accuracy of the transcripts because (61):

"Mr. Gould [the Assistant United States Attorney] simply has to put the person who made the transcript or someone who examined the two and testify he listened to the tapes. He would have to put on the man who listened to the tape and read the transcript and say, have you read the transcript and is this a reasonable and accurate copy of the transcript, and he will say yes, it is."¹¹

In view of this statement, and in view of defense counsel's failure to raise any objection to the accuracy of the transcripts or the audibility of the tapes, Judge Pratt's ruling that there was no "sufficient foundation for not presenting the transcript to the jury as an aid to the hearing of the tapes" (61), was surely correct.

Judge Pratt also ruled that while the tapes would be admitted into evidence, the jury would not be permitted to take them into the jury room, or to view them at all except while listening to the tapes (61-62). Further, while appellant now claims that the transcripts were used "by the jury to determine the actual content of the tapes" (App. Br. p. 22), the record makes clear that Judge Pratt expressly instructed the jury to the contrary. Specifically, his cautionary instructions, issued to the jury immediately prior to the playing of the tapes, were as follows (130):

¹¹ As already noted, this was done through the testimony of DeMetrio (128-129, 153-154, 187-188).

"I will instruct you now that the tape is the record of what happened. The transcript is only an aide and should there be some interpretation of sound or if there is any aspect of the transcript in which you feel it is inaccurate, you are to be guided by your ear rather than your eye. With respect to the evidence the transcript is given only to assist you. I have a copy as well that will help me to understand the tape but it is the tape that is going to be the important part of this."

Appellant's further argument, that DeMetrio "testified that . . . he was unfamiliar with the recording device" used (App. Br. p. 21) is also inaccurate. During his luncheon meeting with appellant in April of 1975, DeMetrio was equipped with a Nagra recorder. While he did not profess to understand the workings of this instrument, he had no need to do so. Since the recorder had been both placed on him and removed from him by Agent Garcia, DeMetrio never once had occasion to touch the machine (255, 257-58, 352-54). As to the instrument used to record the telephone calls, which DeMetrio did operate by himself, he testified that it was "just a regular recorder" (261). At no point did he indicate any unfamiliarity with the device.

The claim that "the actual conversations were . . . made while Demetrio was under the influence of a drug" is yet another distortion of the record. It is true that during the luncheon meeting with appellant, after the two joined a number of appellant's friends, all of them smoked marijuana for a brief period of time (302-03). But appellant neglects to mention that this occurred in connection with only one of the many conversations introduced at trial. More significantly, appellant forgets that the portion of the one tape during which marijuana was

smoked was almost completely eliminated from the trial by stipulation of counsel (11/8/76, at 50; 129).¹²

Finally, appellant argues that he was severely prejudiced by the use of the tapes and transcripts because, in this case, the "actual words used" were "in issue" (App. Br., p. 22). Here, again, appellant departs from the record of the proceedings below. There was no question as to what words were used by appellant and DeMetrio on the tapes, because the words were perfectly audible. What was in issue, as was amply demonstrated by defense counsel's cross-examination of DeMetrio, was the meanings to be given these audible words and the context in which they were spoken. After listening to DeMetrio's testimony and hearing the arguments of counsel in summation, it was for the jury to determine what significance, if any, those words had.

In sum, the admission into evidence of the tapes and transcripts was entirely proper in this case. With the exception of sporadic words or phrases, the tapes were uniformly and clearly intelligible. Even had they not been, their admissibility was within the sound discretion of the trial judge. *United States v. Bryant*, 480 F.2d 785, 790 (2d Cir. 1973); *United States v. Weiser*, 428 F.2d 932, 937 (2d Cir. 1969), *cert. denied*, 402 U.S. 949 (1971). Further, before the tapes were played to the jury, a proper foundation was laid. They were appropriately authenticated through the testimony of DeMetrio,

¹² Appellant also complains that DeMetrio did not see the transcripts of the conversations until several weeks before the trial (App. Br. p. 21). At the outset, it is difficult to comprehend how appellant could possibly have been prejudiced by this. In any event, there was no suggestion in the record that DeMetrio's memory of his conversations with appellant had in any way dimmed. On the contrary, it was apparent from his testimony that he recalled the details of those discussions with considerable precision.

one of the parties to each of the conversations. Additionally, the use made of the transcripts in this case—as an aid to the jury in its listening—has received the approval of this Court. *United States v. Bryant, supra*. Indeed, it would not have been improper for the court below to have allowed the transcripts in the jury room. *United States v. Marin*, 513 F.2d 974, 977 (1975). Finally, the procedure employed here, whereby DeMetrio testified to his understanding of the meaning of certain words and phrases used, has also been approved by this Court. *United States v. Cioffi*, 493 F.2d 1111, 1116 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974).

Most importantly, however, no objection was raised at trial to the audibility of the tapes or the accuracy of the transcripts. That being so, appellant's asserted claims will not be recognized absent plain error. *United States v. Bryant, supra*. The record, here, in no way suggests that any injustice was inflicted on appellant. On the contrary, the procedures employed with regard to the tapes and transcripts were entirely fair and proper.¹³

POINT V

Appellant Was Not Denied A Fair Trial.

Appellant alleges, in summary fashion, a number of additional errors. According to appellant, while each was not necessarily "significant" in and of itself, the "cumulative error" requires the reversal of his conviction, and

¹³ The absence of preliminary examination of the tape by the trial judge is not ground for reversal, particularly where, as here, no objection or request for such an examination was made at trial. *United States v. Bryant, supra*.

the granting of a new trial. All of these claims of error are entirely without merit.

A. The Court Was More Than Justified In Ordering Appellant To Obtain New Counsel And The Counsel Subsequently Obtained Had Ample Time To Prepare For Trial

It is somewhat difficult to discern the issue appellant is pressing in point VII(a).¹⁴ Whatever his objective, he has misstated the scenario that preceded the court's order directing him to obtain new counsel.

Appellant was indicted in this case on April 4, 1976. On May 6, 1976, the Government filed a superseding indictment, and the case was set down for trial on June 21, 1976. Subsequently, at a June 11, 1976 pretrial conference, appellant requested an adjournment until September because of prior trial commitments of his attorney, Ms. Nancy Rosner.

Appellant states that the "request for adjournment was opposed by the Government 'in the interest of justice'" (App. Br. p. 26). The adjournment which the Government opposed was the one granted appellant on June 11, 1976. The Government opposed the adjournment unless the court could find the adjournment was in the interests of justice so that the Speedy Trial rules would not be violated. The prosecutor also expressed skepticism that appellant's attorney Ms. Nancy Rosner, would, in fact, be free to try the case in September as she promised (6/11/76, pp. 5-7). The court granted an adjournment until September 27, 1976, thus

¹⁴ Appellant does not claim that he was deprived of the counsel of his own choosing. Indeed, he has chosen his substituted rather than the original counsel to represent him on this appeal.

delaying the trial three months beyond the scheduled starting date of June 21, 1976.

At the time of the initial adjournment, Ms. Rosner promised the court she would contact the Government or court by September 1 if she could not commence the trial as scheduled on September 27. She never contacted the Government, and when it came to the Government's attention that Ms. Rosner would still be engaged in a trial on September 27, the prosecutor requested a hearing on the matter for September 21, 1976. (9/21/76, pp. 3, 6). At that hearing Ms. Rosner acknowledged she had not contacted the Government or court as promised and would, in fact, not be able to start the trial as scheduled on September 27. She requested an adjournment until early December when she stated she would be free of other commitments. The court pointed out that she had stated in June that she would be free in September too. The court then ordered her to appear with appellant the next day so he could be directed to obtain new counsel (*Id.* at 15-16).

The next day the court, with appellant and Ms. Rosner present, again denied a further request for an adjournment since the Speedy Trial rules made no provision for delaying a trial in order for appellant's counsel to finish other court commitments (9/22/76, p. 20). The court ordered appellant to obtain a new attorney by September 27, five days hence (*Id.* at 3). Ms. Rosner stated she might wish to appeal the court's order to obtain new counsel, and so, the court extended until October 4, the time in which appellant had to obtain a new attorney¹⁵ (*Id.* at 23).

¹⁵ Ms. Rosner never sought to obtain a writ of mandamus from this court, but the trial court allowed appellant until October 4th to obtain new counsel nonetheless.

The gravamen of appellant's claim appears to be that the new counsel had insufficient time to prepare for the trial. He states that "appellant, although he waived his rights to a speedy trial, was compelled by the Court to acquire new counsel on the eve of trial." (App. Br. p. 26). Appellant was ordered to obtain new counsel on September 21 which was within a week, if not the eve, of the *scheduled* trial date. However, the actual trial did not commence until November 8, 1976, over one month after the October 4th date when appellant's present and trial counsel entered the case.¹⁶ This was more than ample time to prepare the straightforward case. In fact, the court noted that, "we are not dealing with a complex case" (9/22/76, p. 20).

In *United States v. Rastelli*, Slip op. 2473, — F.2d — (2d Cir., March 18, 1977), the original defense counsel, as here, was forced to withdraw from the case because a previous trial commitment lasted longer than he expected and thereby conflicted with the trial date in issue (*Id.* at 2478). Even though that case, unlike here, allegedly required "quite a bit of preparation" (*Id.* at 2479), this court refused to hold that allowing the new counsel only seven days to prepare for trial was an abuse of discretion by the trial court (*Id.* at 2479-2480). In the case at bar, appellant's counsel had more than one month to prepare for a simple trial, which had already been delayed over three months at appellant's request. Appellant fails to point to any aspect of the defense that he was unable to prepare within the one month period. Moreover, as in the *Rastelli* case, the fact that appellant was well represented was proved at trial (*Id.* at 2480). Indeed, appellant's satisfaction with his

¹⁶ Appellant had already been in possession of all "3500" material for over three months (Transcript of September 21, 1976, p. 11).

substitute counsel's trial performance is underlined by his decision to retain the same counsel to prosecute the instant appeal. In short, appellant has shown neither that he was prejudiced by the court's order directing him to obtain new counsel nor by the one month period he was given to prepare for trial after he had entered the case. Indeed, he has not even shown that those orders were unreasonable in any manner.

B. The Denial of Appellant's Motion to Exclude Agent Garcia Was Entirely Proper

It is well established that a Government agent assisting in the presentation of a case and sitting with the Government counsel may testify in that case. As this Court stated in *United States v. Pellegrino*, 470 F.2d 1205, 1208 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973):

"Appellants also argue that it was error for the trial court to refuse to order the sequestration of the F.B.I. agent in charge of the case who sat at the prosecution table throughout the trial and was the last witness called by the Government. Since the chief investigating agent may be of significant help to the prosecution during the course of a trial, the trial court has discretion to make an exception to the general rule of sequestration of witnesses in his case . . . [citations omitted]"

See, also, *United States v. Zane*, 495 F.2d 683, 694 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974).

In view of this settled principle, appellant appears to concede that Agent Garcia's presence in the courtroom was not in itself improper. Instead, with no citation to the record, he bases his claim of prejudice on a series of factual assertions concerning Agent Garcia's role at the trial, which culminate in the observation that the Court "clothed him in the mantle of justice and truth" (App.

Br., p. 25). Aside from the simple fact that Agent Garcia operated the recording machine during the trial, these factual claims are pulled out of thin air.

At no point did Agent Garcia have any "conversations with the jury" or come into any "actual contact with the jury." (App. Br. p. 24). Nor did he have any opportunity to "establish . . . a rapport with the jury" (App. Br., p. 24). On the contrary, as the record discloses, the headphones and transcripts were placed on the juror's seats during a recess, and the jury was instructed in the use of the equipment by the Assistant United States Attorney (131). Not surprisingly, the assistance rendered to Government counsel by Agent Garcia was not the subject of any objection at trial.¹⁷

Even had Agent Garcia performed additional ministerial functions in presenting the Government's case, that could not, we submit, be assigned as error. The case agent is allowed to remain at counsel table precisely to render such aid to the prosecution. Further, it is wholly illogical to assume, as appellant does, that a Government agent who assists the prosecution in presenting the Government's case would appear, in the eyes of the jury, as a functionary of the Court.

C. The Denial of Appellant's Motion to Dismiss the Indictment Was Proper

Appellant's argument that the indictment under which he was convicted is invalid because it was allegedly based solely upon hearsay is also without merit.

¹⁷ At trial, defense counsel challenged only Agent Garcia's presence in the courtroom during the testimony of other witnesses, a motion which was properly denied by Judge Pratt because no showing of prejudice was made (46-48).

The Supreme Court, in a case upholding the use in the grand jury of evidence seized in violation of the Fourth Amendment, recently restated the basic principle that "... an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *United States v. Calandra*, 414 U.S. 338, 345 (1974). More specifically, in *Costello v. United States*, 350 U.S. 359, 363 (1956), the Supreme Court held that an indictment may permissibly be based solely on hearsay. This rule has been qualified in the Second Circuit to the extent that indictments will be dismissed where a hearsay account of a transaction is presented to the grand jury as if it were eyewitness testimony. See, *United States v. Estrada*, 471 F.2d 1132, 1136 (2d Cir. 1972); *United States v. Ramirez*, 482 F.2d 807, 811 (2d Cir.), *cert. denied, sub nom. Gomez v. United States*, 414 U.S. 1010 (1973). However, appellant here has made no such claim, either before the trial court or on this appeal.

Moreover, while the trial court did not inspect the grand jury minutes, it was never requested to do so. Instead, when the general hearsay objection was raised by defense counsel, the Assistant United States Attorney fully detailed for the court the contents of the grand jury minutes, thus demonstrating that, to the extent that the minutes contained hearsay, the grand jury had not in any way been misled. Defense counsel, who had previously been supplied with a copy of those minutes as part of the 3500 material, at no point took issue with this explanation (11/8/76, at 37-39).

D. The Post-Arrest Statements were Properly Admitted

Appellant contends that his post-arrest statements were irrelevant and thus inadmissible. The claim is frivolous.

Appellant's flat denial at the time of his arrest that he knew Frank Irace, a co-conspirator, was proven false by the Government's evidence that Irace and appellant spoke on the telephone on a number of occasions, that they met and discussed drugs, and that DeMetrio and appellant often talked about Irace. Appellant's further post-arrest claim that he knew DeMetrio, another co-conspirator, only casually, was shown to be wholly untrue by the considerable evidence, in both DeMetrio's testimony and the tapes, establishing that the two had an active and long-term association, both business and social. As false exculpatory statements, these assertions were circumstantial evidence of a consciousness of guilt and were clearly admissible. *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Lacey*, 459 F.2d 86, 89 (2d Cir. 1972), *cert. denied*, 409 U.S. 860.

Appellant's final post-arrest statement—that he was aware that the agents knew that his source of heroin was Alphonse Sisca, but they could not prove it—was an obvious and extremely probative admission. When objected to at trial, the Court found this admission relevant, at the very least, on the conspiracy charge, and carefully instructed the jury that it was to be considered only in connection with that count (357-64).

Appellant's further argument, that he was denied a fair trial because, in its charge on the voluntariness of the post-arrest statements, the Court at one point used the word "confession", is also without merit. If appellant viewed as prejudicial the use of that word in the last paragraph of an accepted charge,¹⁸ he should have raised

¹⁸ Judge Pratt charged the jury as follows (658-660):

You will recall testimony with respect to statements made by the defendant after he was taken into custody on June 28, 1976. In that connection, I instruct you as follows:

[Footnote continued on following page]

a proper objection at trial. In any event, in view of the overwhelming evidence of guilt, appellant could not have been in any way prejudiced by a semantic error raised for the first time on appeal.

Evidence relating to any statement, or act or omission, claimed to have been made or done by a defendant outside of court, and after a crime has been committed, should always be considered with caution and weighed with great care; and all such evidence should be disregarded entirely, unless the evidence in the case convinces the jury beyond a reasonable doubt that the statement or act or omission was knowingly made or done.

A statement or act or omission is "knowingly" made or done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

In determining whether any statement or act or omission claimed to have been made by a defendant outside of court, and after a crime has been committed, was knowingly made or done, the jury should consider the age, sex, training, education, occupation, and physical and mental condition of the defendant, and his treatment while in custody or under interrogation, as shown by the evidence in the case; and also all other circumstances in evidence surrounding the making of the statement or act or omission, including whether, before the statement or act or omission was made or done, the defendant knew or had been told and understood that he was not obligated or required to make or do the statement or act or omission claimed to have been made or done by him; that any statement or act or omission which he might make or do could be used against him in court; that he was entitled to the assistance of counsel before making any statement, either oral or in writing, or before doing any act or omission; and that if he was without money or means to retain counsel of his own choice, an attorney would be appointed to advise and represent him free of cost or obligation.

If the evidence in the case does not convince beyond a reasonable doubt that a confession was made voluntarily and intentionally you should disregard it entirely. On the other hand, if the evidence in the case does show beyond a reasonable doubt that a confession was in fact voluntarily and intentionally made by a defendant, you may consider it as evidence in the case against the defendant who voluntarily and intentionally made the confession.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
July 25, 1977

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,
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ALVIN A. SCHALL,
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Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 28th day of July 19 77 he served a copy of the within
Brief for The Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Howard F. Cerny, Esq., Pan Am Bldg., 200 Park Ave., NYC 10017

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County
of Kings, City of New York.

Dolores R. Byrd

Sworn to before me this

28 day of July 19 77

Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4546824
Qualified in Kings County
Commission Expires March 30, 1979

